

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE INTEGRATED)
RESOURCE PLANNING FOR THE PROVISION)
OF STANDARD OFFER SUPPLY SERVICE BY)
DELMARVA POWER & LIGHT COMPANY)
UNDER 26 DEL. C. § 1007 (c) & (d): REVIEW)
AND APPROVAL OF THE REQUEST FOR)
PROPOSALS FOR THE CONSTRUCTION OF)
NEW GENERATION RESOURCES UNDER 26)
DEL. C. § 1007 (d))
(OPENED JULY 25, 2006))
)

PSC DOCKET NO. 06-241

**BLUEWATER WIND DELAWARE LLC'S SUBMISSION REGARDING
CONFIDENTIALITY OF DOCUMENTS SUBMITTED IN RESPONSE TO
REQUEST FOR PROPOSALS**

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I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The Delaware Electric Utility Retail Customer Supply Act of 2006 ("EURCSA") was enacted into law in March 2006. Among other things, EURCSA directed the issuance of a Request for Proposals for the creation of new generation sources in the State of Delaware ("RFP"). EURCSA mandated very tight timelines for this process, with the RFP to be issued on November 1, 2006 and submissions due on December 22, 2006. In the end, there were submissions from three parties: one by Bluewater Wind Delaware, LLC ("Bluewater") for a wind project; one by NRG Energy, Inc. ("NRG") for a coal fired plant; and one by Conectiv Energy ("Conectiv") for a natural gas facility.

For its part, Bluewater spent significant time, money and effort putting its team together, performing significant scientific, environmental and engineering research and preparing its bid submissions. In fact, as part of its proposals, Bluewater has put together a project team that has more cumulative experience in building offshore wind projects

than any other assemblage of companies in the world. The partial team list includes the following major companies: Bluewater Wind Delaware, LLC; Ramboll Engineering; Fluor Corporation; Ballast Nedam Contractors; Vestas Wind Systems A/S ("Vestas"); AWS TrueWind, LLC; SEAS-NVE; A2SEA, Ltd.; Downes Associates, Inc.; Tetra Tech, Inc.; ABB Inc. USA; and Ocean Surveys, Inc.

Much of the knowledge, experience and expertise this team brings to bear constitutes extremely valuable intellectual property, that is not available publicly anywhere in the world, and is otherwise highly confidential and proprietary. Indeed, in order for Bluewater to assemble this team, it was required to execute extensive confidentiality agreements by and between these vendors.

Under the press of these very tight EURCSA imposed timelines, all three bidders submitted proposals on or about December 22, 2007, with significant portions of their proposals identified as confidential and/or proprietary. In January 2007, Professor Jeremy Firestone filed two motions with the PSC regarding access to confidential documents filed in this action. In addition, the Delaware News Journal submitted a Freedom of Information Act request for the bid materials.

In response, the PSC has taken a number of steps to ensure proper and prompt public access, while still protecting the integrity of the RFP process. First, the PSC promptly requested the parties submit electronic versions of their proposals, with the documents claimed as confidential, redacted. This allowed the PSC to provide quick public access to those documents that all parties agreed were not confidential or proprietary. Bluewater re-submitted its proposal electronically, with the provisions it

originally claimed as confidential, redacted. Soon thereafter, the redacted proposals for all three bidders were posted on the PSC website.

Second, the PSC held a hearing on February 6, 2007 to consider a mechanism by which the PSC would review the submissions and draw conclusions as to whether certain redacted information as submitted by the parties was, in its view, exempt from disclosure under state law. For its part, Bluewater committed at the February 6, 2007 hearing to reviewing its original submission with an eye toward disclosing additional information to the public, while maintaining its legal right to confidentiality of certain critical information. NRG and Conectiv made similar commitments. The PSC gave each bidder until the end of February 15, 2007 to perform additional reviews of the redacted information and to otherwise file documents supporting their confidentiality claims. Pursuant to that directive, this is Bluewater's submission.¹

¹ Due to inclement weather, the PSC extended the deadline for these submissions to February 16, 2007.

II. DISCUSSION

The development of new generation resources is a critical policy issue for the State of Delaware and one that deserves significant public input. Issues related to the true environmental impact of these proposals, the real long-term costs/value to consumers and the viability of the technologies, will affect Delawareans for decades to come.

Recognizing the importance of public input in this process, Bluewater carefully reviewed the information that was redacted from its initial submission. As a result of that review, Bluewater has now divided this information into three categories. The first category ("Category 1") includes documents that Bluewater has decided to release in the interest of a more public and open process, despite having a probable legal basis for maintaining confidentiality. The second category ("Category 2") is information that Bluewater could properly claim as confidential but is willing to release provided that: (1) the four State Agencies designated as reviewers request such a release; and (2) the same information is released by the other two bidders. The third and final category ("Category 3") is information that must remain confidential and meets all the legal requirements for exemption from disclosure under the Delaware Freedom of Information Act and the PSC Rules of Procedure.²

A. Bluewater Releases 90 Pages of Previously Redacted Material under Category 1.

Bluewater carefully reviewed its submission and determined that in the interest of public disclosure, it will release approximately 90 pages of information that was redacted

² Attached hereto as Exhibit A is an Excel spreadsheet listing the various documents in Categories 2 and 3.

in the original December 22, 2006 submission. These documents are incorporated by reference as Exhibit B to this submission and, due to the large volume and corresponding difficulty transmitting via email, the PSC has been granted access to a shared file on the Bluewater website where these documents are located, as Bluewater and the PSC have routinely transmitted large files in the past. These documents include important information on issues that have been the subject of significant public discourse. For example, to help the public better understand the implications of this project for both ratepayers and PJM, the newly released documents include the wind scheduling program, to forecast for Delmarva and PJM the day ahead and hour ahead market the net megawatt hours at the delivery point, and the average annual wind speeds for the project. Also included is a comprehensive geophysical and interconnection map and Bluewater's Unforced Capacity ("UCAP") calculations. The newly released information also includes specific details regarding the proposed transmission lines, which have been of interest to some members of the public. In short, with the release of this information, Bluewater has taken seriously the PSC's suggestion that bidders be judicious in their claims of confidentiality and Bluewater fully embraces public discourse on these critical issues.

B. Bluewater Will Release Previously Redacted Material Under Category 2 Provided Other Bidders Release Identical Information Simultaneously.

One important basis for Bluewater's confidentiality claims is the harm to Bluewater's competitive position in having their confidential information available to the other bidders during the current RFP process. At the same time, Bluewater recognizes and acknowledges the strong desire for public input regarding critical issues such as price over 20 or more years, electricity output, and pollution impact on the environment.

Accordingly, Bluewater will not object, under certain conditions, to the release of: (1) the net capacity factor and megawatt hours (MWh) delivered annually to the Delivery Point (as defined in the draft Power Purchase Agreement included in the RFP); (2) the bid price in dollars per MWh for each of the years of the PPA term (from 10-25 years as applicable); and (3) the quantities and types of all emissions produced, including but not limited to, Sulfur Oxides (SOx), Nitrogen Oxides (NOx), Mercury, Small Particulates, Discharges into Delaware and Federal waters, all operational waste streams produced, maintenance waste produced, and Carbon Dioxide (CO2).³ Bluewater will agree to release this information provided that the following equitable process is followed.

First, this information must be released for all active proposals of all bidders so that there is a level playing field with respect to the public discourse that will ensue. For its part, Bluewater stands ready, and in fact welcomes the opportunity, to debate publicly the relative merits of its proposal in the public forum but in order to do so, megawatt hours delivered and the emissions, as defined above, must be simultaneously released by all bidders.

Second, this process has been invoked under the color of state law, with the ultimate goal of securing a new generation facility in Delaware that properly meets the needs of our State. The State Agencies have been charged with meeting this goal and are best situated to determine whether the release of this information to the public, at this time, will have a negative effect on their ability to achieve this goal. Thus, Bluewater will not object to the release of this information as described above, provided the State Agencies conclude that doing so will not materially affect the efficacy of the negotiation

³ For example, shared documents 11 and 12, as referenced in Exhibit A, concern certain environmental studies Bluewater has submitted.

process and the successful signing of a long term Power Purchase Agreement as contemplated by EURCSA.

C. Remaining Information is Confidential and Proprietary under Category 3.

The remaining information is highly confidential and proprietary and must remain so.⁴ As was noted above, in developing this proposal Bluewater has put together a project team that has unparalleled levels of experience in building offshore wind projects. This project team has designed or built 21 of the 27 offshore wind projects in the world, with Vestas providing turbines for 64% percent of the work's offshore wind energy capacity. The State of Delaware accrues great benefit from being able to consider a proposal of this magnitude, from a team of companies that are second to none in terms of balance sheet strength, proprietary knowledge, and real world project success.

However, much of the knowledge, experience and expertise this team brings to bear constitutes extremely valuable intellectual property, some of which enjoys patent protection filed in the US and Europe, and is otherwise highly confidential, proprietary and constitutes trade secrets. Thus, in order for Bluewater to assemble this team, it was required to execute extensive confidentiality agreements by and between these vendors. While Bluewater recognizes that a confidentiality agreement alone does not provide a basis for exemption from FOIA, the underlying reason for those agreements does. Simply put, releasing this information would be devastating to these companies and their competitive position in the United States and throughout the world. Thus, while it is necessary and appropriate and required by the RFP for Delmarva, its consultants, the four

⁴ Pursuant to PSC Rule 11, attached hereto as Exhibit C is an Affidavit from Bluewater President and CEO Peter Mandelstam, attesting to his review of these designations.

State Agencies, and its staff and consultants to have the access they enjoy throughout the RFP process to all of this Category 3 information, allowing such information to get into the public forum, and therefore the hands of Bluewater competitors, as well as RFP competitors, is not warranted or legally permissible. Furthermore, it would set an injurious precedent that will serve to deprive the State of Delaware the benefit of future proposals wherein companies have important and valuable intellectual property that could be put to work for the benefit of the State but will not be submitted for fear of losing competitive advantage.

Fortunately, Delaware's Freedom of Information Act ("FOIA"), the PSC Rules, and interpretative case law fully recognize that bidders like Bluewater and its team must be assured that their confidential and proprietary information will be kept confidential, since the likely alternative is for companies such as these to not bid on such projects. Here, Bluewater strikes the right balance in maintaining that the remaining information that was originally deemed confidential and/or proprietary must remain so for the additional reasons below.

By way of review, FOIA provides that "[a]ll public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body." 29 Del. C. § 10003. "Public record" is defined as information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." 29 Del. C. § 10002.

FOIA does, however, provide a number of statutory exceptions to the definition of "public record" (29 Del. C. § 10002) and these exceptions have been found applicable to documents submitted in response to a Delaware agency's request for bids. *See, e.g., Del. Op. Atty Gen. 03-IB21* (Oct. 6, 2003)⁵ (stating that the exemption for confidential commercial or financial information may apply "when the government requires a private party to submit information as a condition of doing business with the government."); *Del. Op. Atty. Gen. 77-037*, 1977 WL 24790 (holding that the commercial or financial exemption "would include information which may have been required to be submitted in order that the agency could evaluate the company but which, if released, would greatly harm the company and might be used by a competitor.") At least two of the FOIA exceptions apply to the information that Bluewater asserts must remain redacted. One such exception is for "[t]rade secrets" and the other is for "commercial or financial information obtained from a person which is of a privileged or confidential nature." 29 Del. C. § 10002(g)(2)⁶.

(1) Trade Secrets Exemption

Trade secrets "consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it". Del. Op. Atty. Gen. 77-029 (Sept. 27, 1977) (quoting Restatement of Torts § 757(b)). Further, a trade secret

⁵ Each of the unpublished opinions cited herein is attached as Exhibit D.

⁶ The attached spreadsheet (Exhibit A) provides a compilation of each document that Bluewater seeks to have confidentiality maintained and also indicates whether the document qualifies as a trade secret and/or commercial/financial information. In addition, the spreadsheet articulates the harm and level of harm if released and indicates when the document can be released to the public.

is "confidential and proprietary information" which, if it "falls into a rival's hands," will cause "serious competitive disadvantage." (Del. Op. Atty. Gen. 00-IB15, 2000 WL 1920102, citing ID Biomedical Corp. v. TM Technologies, Inc., 1994 WL 384605, at p. 4 (Del. Supr.).

The factors that courts have considered in determining whether information constitutes a trade secret under FOIA are: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended developing the information; and (6) the ease or difficulty with which the information could properly be acquired or duplicated by others. Id. (citing Space Aero Products, Inc. v. R.E. Darling Co., 208 A.2d 74 (Md. App. 1965).

Bluewater's proprietary and confidential information falls squarely within the trade secret exception to FOIA, as all six of the factors identified above strongly favor the application of the exception to this information. (See Exhibit A for a brief and generic description of each document and the documents that meet the trade secret exception). Regarding the first three factors, Bluewater, its vendors, contractors, consultants and other experts have been extremely vigilant in protecting this information from disclosure. The information has not been disclosed outside of Bluewater, except for consultants or agents in contract with Bluewater and only after executing confidentiality agreements. Within Bluewater, access to the information is limited to those who need access to perform their designated functions within the company.

Regarding the fourth factor, the information would be extremely valuable to Bluewater's competitors. This information could therefore be used by the competition to gain an unfair advantage over Bluewater and/or members of its team. Such a situation warrants protection of the confidential information. See, e.g., Hecht v. Agency for International Development, C.A. No. 95-263-SLR (D.Del., Dec. 8, 1996) (deeming contractor's technical approaches exempt from disclosure and noting that disclosure of the contractor's profit multiplier could result in an unfair competitive advantage by enabling competing contractors "to accurately calculate [the contractor's] future bids and its pricing structure ...".)

Regarding the fifth factor, the confidential and proprietary information at issue represents a significant investment of time, creativity, effort, and funding by Bluewater and its vendors and contractors. The value of the information comes from the ability to use this investment to Bluewater's competitive advantage. Indeed, Bluewater alone has invested millions of dollars and countless person hours, specifically for the Delaware RFP submission, in researching, developing and compiling this information. Thus, the release of this information would be of enormous value to Bluewater's competitors, who could use the information to benefit their own company without having to put the enormous investment of time, money, and know-how into its development as Bluewater did.

Regarding the sixth factor, the specific information at issue cannot be acquired outside of this source. Offshore wind, though fully established in Europe since 1991, is new to the United States and almost no technical turbine information, detailed production

calculations, and or detailed cost figures have been released. Therefore continued protection is warranted and covered under the 6-part trade secrets test described above.

(2) Commercial or financial information.

The confidential information submitted by Bluewater also falls within the exception for commercial or financial information that is of a "privileged or confidential nature." 29 Del. C. § 10002(g)(2). The Attorney General's office has interpreted this exception as applying to information that, if disclosed, would "cause substantial harm to the competitive position of the person from whom the information was obtained" or "impair the government's ability to obtain necessary information in the future." Del. Op. Atty. Gen. 77-029 (Sept. 27, 1977) (quoting National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

As noted above, disclosure of Bluewater's confidential and proprietary information would cause devastating harm to Bluewater's competitive position. (See Exhibit A for a brief and generic description of each document and the documents that meet the confidential commercial/financial exception). The technology information is an investment of time, money and creativity that cannot be replaced and its release would cause irreparable damage to Bluewater and its vendors and consultants and be a windfall for its current and future competitors both in the wind business and the Delaware RFP.

In Hecht v. Agency for International Development, the Delaware District Court considered a request by an unsuccessful bidder for a government contract to perform energy conservation work. The court found the winning contractor's technology information exempt from public disclosure even though the contract had already been awarded. The court did so after noting the argument of the winning contractor that

"[e]nergy industry privatization and restructuring are long-term processes in a highly competitive market. There will be additional business opportunities in these fields. ... Exposure of these approaches after award of a particular procurement does not automatically diminish the potentiality for harm, because we re-deploy and adapt them to present and future business opportunities." Id. at *10. Also as noted above, release of the confidential and proprietary financial information would severely damage Bluewater's ability to be competitive in future bids. In Hecht, the court determined that the contractor's indirect costs were exempt from disclosure because if released, "the contractor's competitors 'would be able to accurately calculate [the contractor's] future bids and its pricing structure... ." Hecht at *9. Similarly here, significant damage would be caused to Bluewater's competitive position in both the current and future procurements by the release of its confidential financial and technology information.

Regarding the harm to the government, as was noted by the District of Columbia Circuit Court in National Parks & Conservation Ass'n v. Morton, "[U]nless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired." Id. at 767. See also Judicial Watch, Inc. v. Export-Import Bank, 108 F.Supp.2d 19, 31 (D.C.Dist. 2000) ("The government has a compelling interest in ensuring that the information it receives is of the highest quality and reliability, and disclosure of potentially sensitive commercial and financial information ... would jeopardize the [government agency's] ability to rely on any such information that is submitted.") Similarly here, the release of confidential information would impair the government's ability to obtain information in the future, as companies

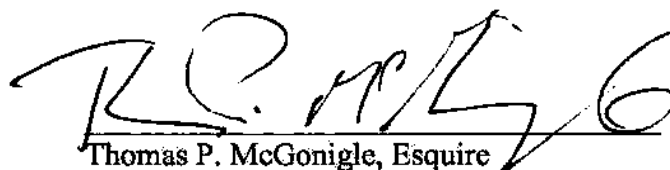
would no longer confidently release sensitive information to the government for fear of losing control of information whose confidentiality is vital to the company's survival.

In short, Bluewater has thoughtfully and carefully parsed through its original submission and has agreed to release substantial portions of this originally redacted material in an effort to facilitate a more vibrant public vetting of these critical issues. The information that remains redacted (Category 3), goes to the core of what the General Assembly (with its original enactment of FOIA), the courts and the PSC have properly recognized as being worthy of protection. Granting this proper protection will not only serve to protect Bluewater and its partners, it will serve all Delawareans well, as the State will continue to benefit from the receipt of the best ideas and proposals from the business and scientific communities.

III. CONCLUSION

Bluewater has taken seriously the need to provide the public with access to as much information as possible. Equally critical, however, is the need for companies to be able to restrict appropriately public access to their confidential information, in order to protect their commercial interests. Bluewater has carefully balanced these needs in its original December 22 submission's claims of confidentiality and now in releasing significant portions of previously redacted material, while maintaining certain information due to business confidentiality imperatives. This remaining confidential information falls within the trade secrets and commercial or financial information exceptions delineated above and therefore should not be released.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T.P. McGonigle', with a large, stylized flourish at the end.

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